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Country Report: The Netherlands

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Introduction

Globalization may have severe negative side impacts on the environment, especially as a consequence of the growing opportunities for businesses to avoid strict national environmental laws by moving operations (or waste) to places in the world where environmental legislation tends to be less well developed and/or enforced. As international law is primarily directed at states and not at transnational corporations, it has serious weaknesses to counteract such severe environmental impacts. Moreover, the few national legislative attempts to specifically regulate the environmental performance of companies that operate abroad, did not pass through parliament.¹ The limitations of law have led to the rise of non-state environmental law in which national authorities play no or only a very limited role.²

Still, the role of national law has not been played yet: as from the mid-nineties of the past century there is a steadily growing body of court cases from the home state of the parent company. One of the first cases in this respect was the *OK Tedi* case, in

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¹ Take for instance the *Australian Corporate Code of Conduct Bill* (2000) and the *Canadian Bill C 300* 'An act respecting corporate accountability for the activities of mining, oil or gas in developing countries'.

² M. van der Heijden and K. Jesse, 'Corporate environmental accountability as a means for intragenerational equity: "Hidden" environmental impacts in the North-South conflict' in H. Bugge and C. Voigt (eds.) *Sustainable Development in International and National Law* (2008) at 349-374.

which 30,000 Papua New Guinean landowners successfully sued the Australian company BHP before an Australian court for the pollution of river systems and adjoining land by the company's copper mine in Papua New Guinea. The case was settled out of court in 1996. One of the latest cases is a 2010 Norwegian Supreme Court decision in which the Danish parent company Hempel was held liable for costs involved with pollution caused by a Norwegian subsidiary and even that of the subsidiary's predecessor in Norway. In between these are some other cases, such as two well-known successful UK court decisions (the 1997 Connelly case and the 2000 *Lubbe v. Cape PLC* case) and two unsuccessful US court decisions (the 1999 *Beanal v. Freeport-McMoran* case and the 2003 *Flores v. Southern Peru Copper Corporation* case).

Although, mainly for tax reasons, a relatively large numbers of transnational corporations have chosen the Netherlands as their elected domicile, only recently we saw the first two court cases – one of them still pending – regarding the alleged liability of (partly) Dutch-based corporations for serious environmental impacts caused while operating in Africa. The first one, the *Trafigura* case, concerned the dumping of hazardous waste in the African state of Ivory Coast. The second one, the *Shell-Nigeria* case, relates to environmental damages from oil leakage in Nigeria. This contribution will discuss both cases in turn, followed by some concluding remarks.

The *Trafigura* Case

In 2006, the multinational trading company Trafigura, which is legally based in the Netherlands (as a Dutch legal entity) but is headquartered in London, chartered the tanker vessel Probo Koala to transport oil products. In June 2006, the waste facility Amsterdam Port Services (APS) in the Netherlands charged Trafigura €12,000 to take from the Probo Koala a chemical waste product called 'slops', which is a regular waste from oil tankers. During the transfer of this waste in Amsterdam, APS noted an abnormal smell and found that the waste was 250 times as polluted as normal slops. The company then refused to take the rest of the waste and informed Trafigura to contact another Dutch company that was suited to receive this kind of toxic waste. Trafigura refused to do so because of the costs involved (€500,000). Instead, the company wanted to take back all the waste.

After having noticed the abnormal smell, APS immediately notified the municipal environmental authorities. APS also requested the port authorities to allow them to return the waste into the ship to be transferred to a facility that is suited to take the polluted waste. After consultations with the supervising authorities concerned, the port authorities allowed APS to return the slops into the tanker as there was no (international maritime) legal basis (i.e. the *MARPOL Convention*) for prohibition. Meanwhile, the municipal environmental authorities, after consulting the national environmental inspectorate, decided to prohibit APS to return the waste because they suspected offences against national environmental law. Consequently, they reported this to the criminal authorities. The Public Prosecutor's Office started an investigation against the Probo Koala and took a sample of the slops. It did not chain up the vessel, although it had the power to do so. All of this happened in the span of only three days. While the municipal and national environmental authorities were still discussing the situation and the Public Prosecutor's Office was still investigating the case, the slops were pumped back by APS following permission granted by the port authorities. Immediately thereafter, the vessel departed to open sea.

Later, it turned out Probo Koala's charge concerned waste of an onboard cleaning process of polluted naphtha. Trafigura bought the naphtha in the United States with the intention to clean ('wash') the naphtha so that it could be used as a blend stock for gasoline. Caustic washes like this have been banned by most countries because of the hazardous waste that remains after the washing process and because of the absence of facilities prepared to take that waste. Therefore, Trafigura decided to do the washing at sea, onboard the Probo Koala.

After leaving the Amsterdam port, the Probo Koala sailed to Abidjan in Ivory Coast. The slops were discharged at a local waste disposal company, called Compagnie Tommy. This company had only been in the possession of a permit to take waste from ships for one month. It charged Trafigura only about €1,200. Both the company and the authorities were notified by the Dutch authorities on the toxicity of the slops, apparently before the dumping took place. Local authorities started an investigation, but they permitted the ship to leave for Europe. During the following night, a total amount of 500 tons of chemical waste was dumped near the Ivory Coast capital of Abidjan, with 5 million inhabitants. Apart from the alleged death of eight to ten people, the various (investigating) reports – though somewhat contradictory –

mention resultant health impacts for several thousands of inhabitants: nose bleeding, diarrhea, nausea, irritated skin and eyes, dizziness, breathing problems and vomiting (including throwing up blood). Displaced people, closed schools in affected areas, closed industries, and laid-off workers were reported as well, as were halted fishing activities and vegetable and small livestock farming. In addition, water sources and food chains were reportedly contaminated, alleging resulting in contaminated food products. The city's household waste treatment centre had to be closed down for two months.

The court cases following the dumping of this waste took place in Ivory Coast, the UK, and the Netherlands. In Ivory Coast, the owner of Tommy was sentenced to 20 years imprisonment and his shipping agent to five years. Criminal and civil law cases were not pursued after Trafigura and the Ivorian authorities reached a settlement of the case for €152,000,000. In the UK, supported by a report of the Netherlands Forensic Institute which showed that the Probo Koala at that time shipped 2,600 liters of a substance containing high levels of the extremely toxic sulphur hydrogen, Trafigura agreed to pay £ 1,000 to each of the 30,000 victims who lodged the claim against Trafigura's headquarters in the UK.

In the Netherlands, two directors of the Dutch waste disposal service APS were arrested. Furthermore, the Dutch criminal authorities decided to prosecute the Ukrainian captain of the Probo Koala together with the CEO of Trafigura. Regarding the CEO, a Dutch court ruled that he should be acquitted, as there was no link between his personal actions and the dumping of the waste. Although a higher court reaffirmed this ruling, the Dutch Supreme Court later declared that decision invalid and referred the case back to the higher court for final sentencing.³

In the case against the other defendants, the Dutch company Trafigura was sentenced to a fine of one million Euros for the illegal export of waste to Ivory Coast. This activity infringed the *EU Regulation on the Shipment of Waste*, which explicitly prohibits the export of waste from the EU to Africa. The Trafigura employee who was leading the onboard treatment of naphtha as well as the discharge of the waste in Amsterdam received a suspended sentence of six months imprisonment and a fine of €25,000 for concealing the hazards while delivering hazardous substances to others. The Ukrainian captain of the Probo Koala was sentenced to five months suspended

³ Supreme Court, 6 July 2010, Case Number LJN: BK9263.

imprisonment for the same crime, as well as for fraud. The director of APS was found guilty of infringing Dutch environmental legislation. However, he was acquitted because he rightfully trusted the port authorities, which allowed him to have the waste pumped back into the ship. The case against the municipal authorities was declared inadmissible because, under Dutch law, governmental authorities cannot be prosecuted for their actions.⁴

Besides these criminal proceedings, on behalf of more than 1,000 Ivorian victims, a Dutch law firm initiated tort proceedings against Trafigura, the city of Amsterdam, and the Dutch State. Independent from that, Dutch national and municipal (Amsterdam) authorities offered one million Euros to the UNEP trust fund to relieve the needs of the victims. In 2008, however, the law firm ceased all activities because of financial constraints: the Ivorian claimants could not apply for legal aid because most of them did not have a passport. Since, under Dutch law, it is not allowed for a law firm to negotiate with the client to transfer a part of the award of the case, there were no funds to cover the huge costs involved in a complicated case like this. As stated above, the UK tort case was more successful as unlike the Netherlands, it is possible to claim all the costs that a law firm makes in a case like this.

The above illustrates that the Netherlands followed a national approach: neither the actual dumping of waste in Ivory Coast nor its consequences was dealt with. Instead, Trafigura was only prosecuted for infringing Dutch law on Dutch territory.

The *Shell-Nigeria* Case

The relevance of the pending civil law *Shell-Nigeria* case is not merely a national one. The proceedings were initiated by four Nigerian plaintiffs together with NGOs Friends of the Earth Netherlands (*Milieudefensie*) and Friends of the Earth Nigeria. These NGOs filed a lawsuit against both the Dutch international headquarters of Shell and its Nigerian subsidiary for alleged negligence relating to environmental damages caused by oil leakages in Nigeria. The four plaintiffs, all farmers and fishermen, claim that agricultural lands have been devastated, drinking water polluted, fish ponds made unusable and the environment and health of local people

⁴ District Court of Amsterdam, 23 July 2010, Case Numbers LJN: BN2052 (municipality of Amsterdam); BN2068 (employee of Trafigura); BN2149 (Trafigura); BN2185 (director of APS); and BN2193 (captain of Probo Koala).

has been harmed. Because the oil leakages spilled over their fields and fishing ponds, they consequently allege a loss of their livelihoods.

First, a jurisdictional matter had to be dealt with. In December 2009 and February 2010, the Dutch court ruled the claims admissible against both the parent company Royal Dutch Shell (RDS) and its subsidiary Shell Petroleum Development Company Nigeria (SPDC) for damage as a consequence of oil spills near the three Nigerian villages of the plaintiffs.⁵ Even though the damage is suffered by Nigerian villagers and is caused by a Nigerian company, the court ruled itself competent to hear the claim against SPDC because of its connectedness to the claim against the RDS. This last mentioned claim holds that RDS should have used its influence on, and control over, the (environmental) policy of SPDC to prevent as much as possible that this Nigerian subsidiary would cause harm to people and the environment. In this respect, the plaintiffs state that RDS has breached its duty of care (due diligence). They request the court to rule that: RDS and SPDC acted improperly against them and are both liable for the damages they have suffered and will continue to suffer; to order the replacement of obsolete and/or defective (parts of) the pipelines near the three villages and maintain them in good condition and to develop or maintain an adequate system of pipeline inspection; to order the cleaning up of the soil around the oil spills; to order purification of water resources concerned; and to order an adequate plan for responding to oil spills to be implemented in Nigeria.

On 28 March 2010, an exhibition request had been placed at the Dutch court to force Shell to make public some thirty internal Shell documents regarding both the leakages at Oruma and the way responsibilities are assigned within Shell. Shell refused to make these documents available. Connected with this request, the plaintiffs' lawyer asked for referral as well to be able to process the possibly results of the exhibition request. In addition, on 28 March 2010, the lawyer of the claimants subpoenaed the former parent company of the Shell concern. The reason for doing so is that RDS states it is not liable because it did not formally exist at the time of the leakages. Thus, also the former Royal Dutch Shell Group and former Shell Transport and Trading will be formally involved in the process.

⁵ District Court of The Hague, 30 December 2009, Case Number LJN: BK861624 (Oruma); 24 February 2010, Case Number LJN: BM1469 (Ikat Ada Uda); and 24 February 2010, Case Number LJN: BM1470 (Goi).

Apart from the aforementioned matters, the court also has to consider whether or not all of the plaintiffs will have standing (in particular with respect to the NGOs). Furthermore, the court will have to decide whether or not RDS can be held liable for its subsidiary. RDS states it is only a shareholder of Shell Nigeria and, therefore, rejects liability. However, considering RDS owns 100 per cent of SPDC's shares, the court may decide otherwise.

The choice of law will have to be dealt with as well. Most probably, the defendants will reason that the court should apply Nigerian law, whereas the plaintiffs will reason that the court should apply Dutch law. *The EU Regulation on the Law Applicable to Non-Contractual Obligations*⁶ (*Rome II*), which entered into force in January 2009, is relevant to the choice of law. Article 7 of *Rome II* adds a distinctive environmental principle that leaves the person seeking compensation for extraterritorial environmental damage the option to choose to base the claim on the law of the EU Member State in which the corporation to be sued is incorporated – provided this member state can be considered as the country in which the event giving rise to the damage occurred. To fulfill this latter condition, the place where this event occurred needs to be interpreted as the place where the parent company is incorporated. This interpretation might well be viable should acts or omissions by a parent company (such as the failure to have a subsidiary implement an adequate emergency scheme) have led to the environmental harm abroad. Article 7 may help people from countries with weak environmental legislation, such as Nigeria, in case they want to sue the parent company for damages caused by local subsidiaries' activities. Still, it is not yet clear whether or not this community-oriented regulation leaves room to apply it to transnational tort cases if the harmful effect is neither felt in an EU member state nor at one of its neighbour countries.

If, on the basis of article 7 of *Rome II*, Dutch tort law (for example article 6:162 of the *Dutch Civil Code*) is applicable to transnational tort cases, the question remains whether the elaborated legal framework of (partly European based) Dutch environmental standards can be invoked in transnational litigation. Nevertheless, based on the legal doctrine of indirect effect, (hard or soft) international law could be relevant to support constructing one of the three grounds for tortious liability: violation of a rule of unwritten duty of care. In the non-tort decision of 21 June 1979 against the corporation Batco, the Court of Chamber accepted the legally non-

⁶ Regulation 864/2007/EC, OJ L 199/40.

binding *Guidelines for Multinational Enterprises of the OECD*, adopted by the company, to sustain the claim of mismanagement. It has been argued that this finding seems also possible for a tort, all the more so because codes of conduct, unlike treaties, are expressively addressed at companies. If, on the other hand, Nigerian law constitutes the applicable law in the *Shell-Nigeria* case, the Dutch court could still give effect to international environmental law as courts can ignore particular rules of this foreign state if these violate international law.

Concluding Remarks

Although both the *Trafigura* case and the *Shell-Nigeria* case concern overseas environmental impacts, the cases differ considerably. For one, the *Trafigura* case followed a criminal law track, whereas the *Shell-Nigeria* case follows a tort proceeding. This difference is, however, not substantial. It could have been the other way round as well. Still, for merely economic reasons, the Dutch public prosecutor might be reluctant to start criminal proceedings against Shell. Secondly, unlike the national law approach used in the *Trafigura* case, in the *Shell-Nigeria* case the actual consequences of the oil leakages in Nigeria, and the way RDS and SPDC responded to these are central. Also, in the *Shell-Nigeria* case, soft law such as codes of conduct might be relevant to support constructing the violation of the duty of care.

Given contemporary calls for corporate sustainability, many companies have either volunteered to adhere to codes of conduct and/or have their own ones in place. Independent monitoring mechanisms are, however, seldom incorporated. Through interpretation of a rule of unwritten duty of care with reference to such codes of conduct, they might be uplifted from a merely public relations effort to a useful purpose in transnational tort law.